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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 587

**THE CITY OF CRYSTAL LAKE, an Illinois
Municipal Corporation,**

Petitioner,

VS.

**NATIONAL YEAST CORPORATION, formerly
NATIONAL GRAIN YEAST CORPORATION,
a New Jersey corporation,**

Respondent.

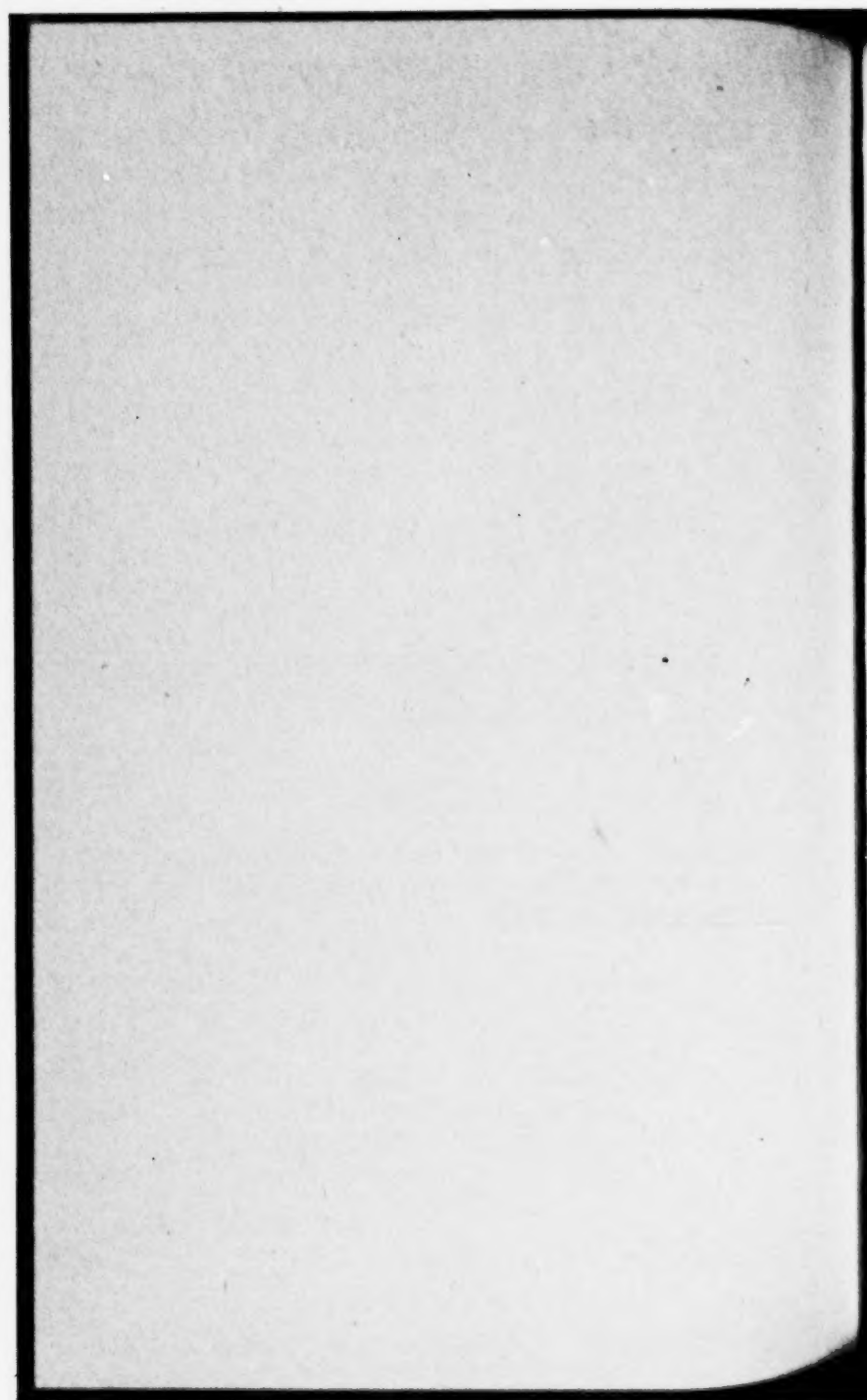
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT.**

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**PETITION FOR WRIT OF CERTIORARI TO THE
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SEVENTH CIRCUIT.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The City of Crystal Lake, an Illinois municipal corporation, respectfully presents this its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered in the above entitled cause on November 8, 1948, and in which a petition for rehearing was denied on December 7, 1948, and respectfully represents to this Court:

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The fundamental matter involved in this case concerns the power and authority of the United States District Court, by use of an injunction, to extend the term of a written agreement between the National Grain Yeast Corporation, the City of Crystal Lake and Crystal Lake Building Corporation, which agreement was without consideration, was *ultra vires* the powers of the City, had been breached by the Yeast Company during the entire term of the agreement, and by its express terms had expired. There is also involved the jurisdiction of the District Court to entertain this suit because the Crystal Lake Building Corporation, one of the parties to the agreement, was not made a party to the suit, and if it had been made a party there would not have been diversity of citizenship, which was the only ground for bringing the suit in a federal court.

The agreement in question was dated November 10, 1939. By that agreement the City purported to grant to the Yeast Company the free use of the City's storm sewer for disposal of the waste resulting from the manufacture of yeast by the Yeast Company at its yeast plant in the City of Crystal Lake. (R. 19-22.)

The storm sewer was constructed and is maintained by the City through taxation for the sole purpose of providing a means for the discharge of surface waters accumulating on the streets of the City, and is necessarily equipped with open drains with grated coverings, extending from the street down to the storm sewer, through which any obnoxious odors from sewage and industrial waste dis-

charged into the storm sewer would arise and permeate the air, causing great discomfort and annoyance to the residents of the City.

By the agreement, the City purported to *allow* the Yeast Company to connect its waste disposal line to the City's storm sewer. The Yeast Company agreed to install a shut-off valve in its disposal line, and agreed that the City should have free access to that valve and the right to close the valve to prevent the discharge of the effluent (consisting of the waste and cooling water resulting from the manufacture of yeast) into the storm sewer upon certain conditions, such as the storm sewer becoming overloaded by reason of a rain storm, or an excessive flow of the effluent from the Yeast Company's plant or in the event the Illinois Sanitary Water Board should notify the City that the discharge of the effluent into the storm sewer constituted a pollution of the stream into which the storm sewer emptied, or in the event repairs to the storm sewer should be necessary. (R. 19-22.)

By the Sixth paragraph of the agreement, the Yeast Company agreed that "it will treat all of the effluent discharged from its treatment plant, so as to prevent any unpleasant odors from arising at the point where the storm sewer of the City of Crystal Lake discharges into the Crystal Lake outlet". (R. 21.)

By the Seventh paragraph of the agreement, the Yeast Company and the Crystal Lake Building Corporation, "owner of said property", agreed to indemnify the City against any damages it might sustain by reason of any claims filed against the City on account of the Yeast Company discharging its effluent into the storm sewer, and agreed for the life of the agreement not further to encumber the yeast plant. (R. 22.)

Paragraph Eleventh of the agreement is as follows:

"This agreement shall extend for a period of five (5) years and expire five (5) years from the date hereof, but is subject to renewal, providing conditions are satisfactory to both parties hereto, at the expiration of this agreement." (R. 22.)

Within a few days after the agreement was signed by the parties thereto, the Yeast Company, without treating the waste from its yeast plant so as to remove unpleasant odors from arising therefrom, commenced to discharge the waste into the City's storm sewer (R. 93, 101) and continued to discharge its waste into the storm sewer during the entire five-year term of that agreement (R. 120), notwithstanding the continuous protests of the residents of the city of Crystal Lake and the City Council that the nuisance arising from the obnoxious odors be eliminated. (R. 154, 162-163, 167, 172-173, 184, 190, 194, 201, 205, 210, 178-182.) The evidence in this case is conclusive and uncontradicted, and was admitted by all of the witnesses called by the Yeast Company, including its officers, that the obnoxious odors arising from the discharge of the Yeast Company's waste into the storm sewer continued from the time the waste was first discharged into the storm sewer up to the time, and long after the time, when the five-year term of the agreement of November 10, 1939, expired. (R. 152-177, 183-216, 102, 109-114, 132-133, 222.)

The matter of the obnoxious odors was called to the attention of the Mayor and members of the City Council many times by residents of the City from the time the Yeast Company commenced to discharge its waste into the storm sewer up to and long after the agreement by its terms expired (R. 154, 162-163, 167, 172-173, 184, 190, 194, 201, 205, 210), and resolutions regarding the same were passed at various times by the City Council of Crystal

Lake demanding that the Yeast Company either remedy the situation or cease discharging its waste into the storm sewer. (R. 178-182.) The first of those resolutions was passed on June 15, 1940, less than six months after the Yeast Company had begun to discharge its waste into the storm sewer. Then followed resolutions passed on March 4, 1941, September 15, 1942, October 10, 1942, and July 20, 1943, none of which caused the Yeast Company either to remove the odors from the waste or to cease using the storm sewer.

On December 7, 1943, the City Council adopted a motion that "the City should not renew the contract with the Yeast Company for waste disposal in storm sewer at conclusion of present contract." (R. 181.)

On February 15, 1944, after considering a letter from the Illinois Sanitary Water Board urging the City to reconsider its action of December 7, 1943, a motion was adopted to send the following answer to the Illinois Sanitary Water Board:

"The City Council has decided that no change shall be made contrary to the decision made on December 7th, 1943." (R. 181.)

Again on April 4, 1944, after considering a letter from the Illinois Sanitary Water Board, and arguments made by a vice-president of the Yeast Company urging a renewal of the agreement, and objections made by residents of Crystal Lake against such renewal, a motion was adopted by the City Council that the City deny the Yeast Company the use of the storm sewer at the expiration of the existing agreement on November 10, 1944. (R. 182.)

On November 3, 1944, the National Grain Yeast Corporation filed its complaint in the District Court to enjoin the City from preventing the discharge of its waste and

cooling water into the storm sewer after the expiration of the agreement of November 10, 1939. (R. 2-16, 19-22.) The District Court denied the Yeast Company's motion for a preliminary injunction. (R. 31-32.) The Yeast Company appealed to the United States Court of Appeals for the Seventh Circuit, and that Court reversed the order of the District Court, and remanded the cause for further proceedings in accordance with the views expressed in the opinion of the Circuit Court of Appeals. In substance the Circuit Court of Appeals held that the Yeast Company was entitled to a renewal of the agreement of November 10, 1939, if it should prove that it diligently and in good faith attempted to comply with its agreement, although it wholly failed to perform one of the most important provisions of the agreement, viz., the agreement by the Yeast Company to treat its waste so as to eliminate unpleasant odors before discharging its waste into the storm sewer. The opinion further said, in effect, that if the Yeast Company was prevented from eliminating the odors, up to the time of the expiration of the agreement, because of lack of co-operation by the City or because of war conditions restricting the use of materials required for the installation of a system which the Yeast Company claimed would remove the odors, then the Yeast Company was entitled to a renewal of the agreement. *National Grain Yeast Corporation v. City of Crystal Lake*, 147 Fed. (2d) 711. (A copy of the opinion is set forth as Appendix I following the brief in support of this petition.)

The Circuit Court of Appeals did not, in its opinion, consider the question of *ultra vires* or want of consideration, and did not have before it the volume of undisputed evidence showing the unbearable situation arising from the discharge of the obnoxious waste into the storm sewer, or the innumerable complaints made by the residents of

Crystal Lake to the Mayor and members of the City Council, or the numerous resolutions passed by the City Council demanding that the Yeast Company cease using the storm sewer for the discharge of the waste from its yeast plant. Neither did the Circuit Court of Appeals, in its opinion, even mention the Sixth paragraph of the agreement by which the Yeast Company agreed to treat all of its waste discharged into the storm sewer so as to prevent any unpleasant odors from arising therefrom. Instead, it erroneously stated the issue before the Court as being whether the Yeast Company had done everything within its power to minimize and eradicate the odors incident to the operation of its plant, or whether it had done nothing to abate the nuisance during the existence of the nuisance. Notwithstanding there was no such issue presented, the Circuit Court of Appeals refused, on application by the City for a rehearing, to modify or change its opinion so as to truly set forth the issue presented to that Court, viz., whether the Yeast Company had performed its positive agreement to treat all of the waste discharged into the storm sewer so as to prevent any unpleasant odors from arising therefrom.

After the remandment of the cause to the District Court, the City filed a motion to dismiss the complaint on the ground (1) that the Crystal Lake Building Corporation, an Illinois corporation, was a party to the agreement of November 10, 1939, and therefore was an indispensable party to the suit and it being a citizen of the same state as the defendant, the necessary diversity of citizenship was lacking to give the District Court jurisdiction on that ground; (2) that the contract is *ultra vires* because the City had no authority to permit the discharge of sewage from private sources into the storm sewer; and (3) that the contract shows that there was no consideration to be paid

to the City by the Yeast Company for the use of the storm sewer by the Yeast Company. (R. 47-48.) The motion to dismiss was denied by the District Court. (R. 49.)

The City then filed an answer in which, among other things, it was alleged (1) that the Building Corporation was the owner of the yeast plant and was a party to the agreement of November 10, 1939, but that the Yeast Company had failed to join with it, as plaintiff, the Building Corporation, apparently in an attempt to confer upon the District Court jurisdiction upon the ground of diversity of citizenship, when there was no such diversity of citizenship; (2) that the City refused to renew the agreement because the agreement by its terms had expired and because the Yeast Company had not, prior to November 10, 1944, complied with its express agreement to eliminate all odors arising from the waste in accordance with the agreement; (3) that the agreement of November 10, 1939, had expired and no renewal thereof has been made; and (4) that the Yeast Company never agreed to pay and has not paid, any compensation to the City for the use of the storm sewer. (R. 49-67.)

The Court referred the cause to a Master in Chancery to take the evidence and report to the court his findings of fact and conclusions of law. The Master in his report to the court made certain findings of fact, which were unsupported by any evidence, and reported certain conclusions of law, which were clearly erroneous, and, based thereon recommended that an injunction be issued enjoining the City from interfering in any manner with the discharge of the Yeast Company's cooling water and waste into the storm sewer prior to November 10, 1949. (R. 239-253.)

After overruling the City's objections to the Master's report, the District Court entered a decree approving and confirming the Master's report and granting an injunction

in accordance with the Master's recommendation. (R. 260-263.) From that decree the City appealed to the United States Court of Appeals for the Seventh Circuit, which Court affirmed the decree of the District Court. (A copy of the opinion is set forth as Appendix II following the brief in support of this petition.)

The only matter considered in the opinion of the Circuit Court of Appeals was the question of lack of jurisdiction of the District Court because of the failure of the Yeast Company either to join as a co-plaintiff or to make defendant the Building Corporation as a party to the suit. As to all other questions, such as want of consideration and *ultra vires*, the Circuit Court of Appeals, in its opinion, merely said that they were decided against the City on the former appeal from the order of the District Court denying a preliminary injunction, which is not a fact as shown by the opinion of that Court reported in 147 Fed. (2d) 711.

II.

BASIS FOR JURISDICTION OF THIS COURT.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C-229 (43 Stat. 938; 28 U. S. C. Sec. 347). The judgment of the Circuit Court of Appeals on the merits was entered on November 8, 1948, a petition for rehearing was filed within the time allowed by the rules of said Court, and was denied on December 7, 1948, without opinion. (R. 303-304.) This petition for certiorari is filed within three months from December 7, 1948, and thus within the time allowed by the Judicial Code and the rules of this Court.

III.

THE QUESTIONS PRESENTED.

1. Did the United States District Court have jurisdiction of this suit under Section 41, subd. (1) of the Judicial Code on the ground of diversity of citizenship?

(The Crystal Lake Building Corporation, an Illinois Corporation, was a party to the agreement of November 10, 1939, but it was not made a party to this suit. Had it been made a party to this suit, it would have destroyed jurisdiction on the ground of diversity of citizenship.)

2. Could the District Court, by injunction, extend for an additional term of five years an agreement which had expired and which was subject to renewal only if conditions were satisfactory to the parties thereto at the expiration of the agreement?

(The City, not the Yeast Company nor a Federal Court, had the right to decide whether conditions were satisfactory to it at the expiration of the agreement. The City was fully justified in deciding that conditions were not satisfactory to it at the expiration of the agreement because of the discharge of waste by the Yeast Company into the storm sewer during the entire five-year term of the agreement causing sickening and obnoxious odors to arise therefrom and permeate the air of Crystal Lake in violation of the express agreement of the Yeast Company, without any qualification, to treat its waste before discharging it into the storm sewer so as to prevent any such disagreeable odors from arising therefrom.)

3. Could the District Court, by injunction, compel the City to allow the Yeast Company to continue for an additional period of five years, the discharge of its obnoxious and stinking waste into the City's storm sewer?

4. Was the right of the Yeast Company to a renewal of the agreement of November 10, 1939, dependent upon conditions existing at the termination of the agreement of November 10, 1939, or at a time long subsequent thereto after the installation of a new system for treating the waste to remove the odors therefrom?

(The installation of the so-called closed system had not eliminated the obnoxious odors arising from the yeast waste discharged into the storm sewer up to February, 1946, more than a year after the expiration of the agreement of November 10, 1939, and more than a year after this suit was begun and the preliminary injunction was issued herein (R. 152-177, 183-216, 132-133), and the obnoxious odors still arise from the waste discharged into the storm sewer whenever the waste treatment plant is not properly operated or whenever there is a breakdown of equipment or machinery at the waste treatment plant. (R. 133, 135, 224-225.)

5. Could the District Court, by injunction, decree enforcement of an agreement by the City which was *ultra vires* the powers of the City to make?

6. Could the District Court, by injunction, compel the City to perform an agreement which was not based on any consideration to the City?

IV.

REASONS FOR ALLOWANCE OF WRIT.

1. In order to sustain jurisdiction of the District Court on the ground of diversity of citizenship, the Circuit Court of Appeals has erroneously held that the Crystal Lake Building Corporation, an Illinois Corporation, was not an indispensable party to this suit, which in effect was a suit to have the Federal Court adjudge and decree that the

agreement of November 10, 1939, had been, or should have been, renewed for an additional term of five years. The Building Corporation was a party to the agreement, but is not bound by the decree in effect renewing that agreement because it was not made a party to the suit. Had it been made a party to the suit, either as a co-plaintiff or as a co-defendant, there would have been no diversity of citizenship because its interest in the litigation would have been antagonistic to that of the City.

2. The decision of the Circuit Court of Appeals, if allowed to stand, will adversely affect the right of municipalities throughout the United States to restrict or control the use by private corporations of facilities installed by the municipality with public funds, contrary to all rules of law heretofore established.

3. The decision of the Circuit Court of Appeals that the City did not have the absolute right to determine for itself whether conditions were satisfactory to it at the expiration of the agreement of November 10, 1939, and to refuse to renew the agreement on the ground that conditions were not then satisfactory to it, is manifestly wrong.

4. The decision of the Circuit Court of Appeals that the discharge of waste by the Yeast Company into the storm sewer causing obnoxious and sickening odors to arise therefrom and to permeate the air of Crystal Lake, to the great discomfort and annoyance of the residents of the City, during the entire five-year term of the agreement, did not justify the City in its decision that conditions were not satisfactory to the City at the expiration of the agreement of November 10, 1939, is most clearly wrong and contrary to all reason.

5. The Master found and the District Court adopted the finding which was approved by the Circuit Court of Appeals without any comment or discussion, that the contract of November 10, 1939, was based upon good and

valuable consideration on the part of both the Yeast Company and the City, which is contrary to the undisputed evidence in this case that the Yeast Company never paid, nor agreed to pay, anything for the use of the storm sewer for the disposition of its waste. (R. 105, 164, 211.)

6. The Master found, and the District Court adopted the finding which was approved by the Circuit Court of Appeals without any comment or discussion, that the contract of November 10, 1939, was within the power and authority of the City and was not *ultra vires* or void, which is contrary to the statutes and law of the State of Illinois.

7. The Master found, and the finding was adopted by the District Court, and approved by the Circuit Court of Appeals, that continuously from the time of locating its manufacturing plant, the Yeast Company diligently and in good faith sought to eliminate unpleasant odors from the yeast waste discharged into the storm sewer, which is not supported by the evidence.

8. The finding of the Master, which was adopted by the District Court and approved by the Circuit Court of Appeals, that the Yeast Company has carried out and performed each term, provision and condition of the contract with the City, dated November 10, 1939, is contrary to all evidence in this case.

8. The City was not obligated under its agreement with the Yeast Company to co-operate with the Yeast Company to eliminate the odors from the waste discharged into the storm sewer by the Yeast Company. The only duty of the City was to do nothing to *prevent* the Yeast Company from performing its agreement. There is not a scintilla of evidence showing that the City did anything to prevent the Yeast Company from carrying out its agreement to treat its waste so as to prevent any unpleasant odors from arising therefrom; yet the Master found, and the District Court adopted the finding which was approved by the Circuit

Court of Appeals, that the City failed and refused to co-operate with the Yeast Company in its efforts to eliminate odors from the yeast waste discharged into the storm sewer. No facts were shown even tending to prove that the City failed or refused to co-operate with the Yeast Company in its efforts to eliminate the odors. The finding of the Master was based entirely on conclusions of witnesses, unsupported by any facts, that the City failed to co-operate. (R. 10, 79, 82, 95, 98, 99, 229-230.) (Sebastian C. Lutz, the Yeast Company's vice-president, testified: "I don't know of anything in the contract of November 10, 1939, that puts any burden on the City to do anything in connection with the yeast operation in eliminating the odors from the waste." R. 231.)

9. In his report the Master erroneously stated, and that statement was approved by the District Court and the Circuit Court of Appeals, and was necessarily a most important basis for the decree in this case, that "apparently the contract does not bind the plaintiff to an absolute elimination of said odors but does put the burden upon the plaintiff to use its best efforts to eliminate them, entirely if possible". That statement is not justified by the express language of Section Sixth of the so-called contract, by which the Yeast Company agreed to "treat all of the effluent discharged from its treatment plant, so as to prevent any unpleasant odors from arising at the point where the storm sewer of the City of Crystal Lake discharges into the Crystal Lake outlet". It is entirely contrary to the understanding of the attorney who represented the Yeast Company in the negotiations and drafting of the agreement, who testified that "Paragraph 6 of the agreement constitutes an affirmative undertaking by the National Grain Yeast Corporation to so treat its waste at its own expense as to destroy unpleasant odors arising from disposition of the waste into the storm sewers". (R. 118.)

It also destroys the purpose of limiting the agreement to a term of five years with the right of renewal for an additional five years if conditions should be satisfactory to both parties at the expiration of the agreement, because in the negotiations, when the attorney for the Yeast Company objected to limiting the agreement to an original term of five years, the Mayor told the attorney for the Yeast Company, according to that attorney's testimony, that the City had put in the five-year clause, and to extend it for an additional five years, because the City wanted to be sure that the Yeast Company's operation there would not have odors, which had caused a lot of difficulty in the City and complaints by the people who were living there. (R. 115.)

10. The Master found, and the District Court adopted the finding which was approved by the Circuit Court of Appeals in accordance with its opinion rendered upon the appeal from the order of the District Court denying a temporary injunction, that if World War II prevented a party from complying with his agreement, then he is relieved from such non-compliance. Such is not the law when the party in default is attempting to enforce compliance with the contract against the other not in default.

Wherefore petitioner, The City of Crystal Lake, prays the issuance of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court in the above entitled case.

Respectfully submitted,

THE CITY OF CRYSTAL LAKE,
Petitioner,

By HOMER D. DINES,
JOSEPH A. CONERTY,
DONOVAN Y. ERICKSON,
Its Attorneys.

DAILY, DINES, WHITE & FIEDLER,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1948.

The City of Crystal Lake, an Illinois Municipal Corporation, <i>Petitioner and Appellant Below,</i>	}	No.
<i>vs.</i>		
National Yeast Corporation, formerly National Grain Yeast Corporation, a New Jersey Corporation,		
<i>Respondent and Appellee Below.</i>		

**BRIEF IN SUPPORT OF PETITION FOR A WRIT OF
CERTIORARI.**

I.

THE OPINIONS OF THE COURTS BELOW.

The District Court did not deliver any opinion in this case.

The Circuit Court of Appeals for the Seventh Circuit delivered an opinion when it reversed the order of the District Court denying a preliminary injunction, which opinion is reported in 147 F. (2d) 711, and a copy of which is set forth as Appendix I following this brief.

The opinion of the Circuit Court of Appeals affirming the decree of the District Court awarding a permanent injunction herein has not yet been reported, but appears at pages 296-302 of the record herein, and a copy of that opinion is set forth as Appendix II following this brief.

No other opinion was delivered by the Circuit Court of Appeals in this case.

II.**JURISDICTION OF THIS COURT.**

A statement particularly disclosing the grounds on which the jurisdiction of this Court is invoked is set out in the Petition for the Writ of Certiorari at page 9.

III.**STATEMENT OF THE CASE.**

A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate page references to the printed record, is set forth on pages 2 to 9 of the Petition for the Writ of Certiorari, and for brevity is not here repeated.

IV.**SPECIFICATION OF ERRORS.**

In support and amplification of the reasons relied upon for the allowance of the writ, as set forth on pages 11 to 15 of the Petition for Writ of Certiorari, it is the contention of the petitioner that the Circuit Court of Appeals erred in the following respects:

1. In holding that the Crystal Lake Building Corporation was not an indispensable party to this suit, and that, therefore, the necessary diversity of citizenship existed to give the District Court jurisdiction of this suit.

2. In holding, by affirming the decree of the District Court, that the District Court, by injunction, could extend for an additional term of five years an agreement which had expired and which was subject to renewal only if

conditions were satisfactory to all of the parties thereto at the expiration of the agreement.

3. In holding, by affirming the decree of the District Court that the City did not have the right to determine whether conditions were satisfactory to it at the expiration of the agreement of November 10, 1939, and to refuse to renew the agreement on the ground that conditions were not then satisfactory to it.

4. In holding, by affirming the decree of the District Court, that the discharge of waste by the Yeast Company into the storm sewer causing obnoxious and sickening odors to arise therefrom and permeate the air of the City during the entire five-year term of the agreement, did not justify the City in refusing to renew the agreement for an additional period of five years.

5. In holding, by affirming the decree of the District Court, that the right of the Yeast Company to a renewal of the agreement was not dependent upon conditions existing at the termination, but was to be determined upon the conditions existing a long time after the termination of the agreement and after the institution of this suit, when, by reason of the installation of a new system for treating the waste, the Yeast Company succeeded in removing the odors arising from the discharge of its waste into the storm sewer except when there was a breakdown of the new system or a failure to operate it properly.

6. In holding, by affirming the decree of the District Court, that the agreement of November 10, 1939, did not bind the Yeast Company to an absolute elimination of odors from the waste discharged by it into the storm sewer, but only required the Yeast Company to use its best efforts to eliminate such odors.

7. In holding, by affirming the decree of the District Court, but without any discussion, that the agreement of

November 10, 1939, and in particular the agreement for renewal, was not *ultra vires* the powers of the City to make.

8. In holding, by affirming the decree of the District Court, but without any discussion, that the agreement of November 10, 1939, was based upon good and valuable consideration on the part of both the Yeast Company and the City.

9. In holding, by affirming the decree of the District Court, that the City was not justified in refusing to renew the agreement of November 10, 1939, on the ground that conditions were not satisfactory to it because of the obnoxious odors arising from the waste discharged into the storm sewer by the Yeast Company during the entire term of the agreement, if World War II impeded or prevented the Yeast Company from obtaining materials for the construction and completion of its so-called closed system on or before the expiration of the agreement.

V.

ARGUMENT.

**THE NECESSARY DIVERSITY OF CITIZENSHIP
WAS LACKING TO GIVE THE DISTRICT COURT
JURISDICTION.**

The Crystal Lake Building Corporation, an Illinois Corporation, was a party to the agreement of November 10, 1939, which, by the decree of the District Court, was, as against the City and in favor of the Yeast Company alone, renewed for an additional term of five years upon the theory that the City was required to enter into such a renewal of agreement by reason of the provisions of the Eleventh section of the agreement of November 10, 1939, that the agreement was "subject to renewal, providing conditions are satisfactory to both parties hereto, at the expiration of this agreement". Manifestly the term "both parties" meant the Yeast Company and the Building Corporation as one party and the City as the other party.

At the time the agreement was made, the Building Corporation was the owner of the Yeast plant. It agreed to indemnify the City against any damages the City might sustain by reason of any claims filed against the City on account of the Yeast Company discharging its effluent into the storm sewer and further agreed for the life of the agreement not further to encumber its plant. (R. 22.) The Building Corporation continued to hold title to the Yeast plant until October, 1944 (R. 105), only a few days before this suit was brought, when it transferred the title to the Yeast Company for the very obvious purpose of an attempt to confer jurisdiction on the federal Court in a

suit by the Yeast Company alone on the ground of diversity of citizenship, which would not have existed if the Building Corporation had been made a party, either plaintiff or defendant, as its interest would have been antagonistic to that of the City.

It is manifest that the Building Corporation was an indispensable party to this suit.

When a final decree cannot be entered in a suit without affecting the interest of a party to an agreement, such party is an indispensable party to such suit. *Shields v. Barrow*, 17 How. 130, 139-140; *Shell Development Co. v. Universal Oil Products Co.*, 157 Fed. (2d) 421, 424.

When jurisdiction is founded on diversity of citizenship, it must be shown that all persons on one side of the case are citizens of different states from all persons on the other side. *Strawridge v. Curtis*, 3 Cranch 267; *Indianapolis v. Chase National Bank*, 314 U. S. 63, 69; *Thomson v. Butler*, 136 Fed. (2d) 644, 647.

The omission of a necessary party, who cannot be made a party without defeating the jurisdiction of the court, requires a dismissal of the cause. *Shields v. Barrow*, 17 How. 130, 140-142; *Evans v. Gorman*, 115 Fed. 399, 404; *Thomson v. Butler*, 136 Fed. (2d) 644, 646-647.

When arrangement of parties is merely a contrivance between friends for the purpose of founding jurisdiction on diverse citizenship in a Federal Court, which otherwise would not exist, the device cannot be allowed to succeed. *City of Dawson v. Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company*, 197 U. S. 178, 181.

If a corporation has any corporate existence separate from that of the complainant, it is an indispensable party if a final decree cannot be made without affecting its interest and leaving the controversy in a condition wholly

inconsistent with that equity which seeks to put an end to litigation by doing complete and final justice. *Niles-Bement-Pond Company v. Iron Moulders Union Local No. 68 et al.*, 254 U. S. 77, 81.

1.

THE CITY HAD THE RIGHT TO DETERMINE WHETHER, UPON THE EXPIRATION OF THE AGREEMENT OF NOVEMBER 10, 1939, CONDITIONS WERE SATISFACTORY TO IT WITH REFERENCE TO A RENEWAL OF THE AGREEMENT ALLOWING THE YEAST COMPANY TO CONTINUE TO DISCHARGE ITS WASTE AND COOLING WATER INTO THE STORM SEWER FOR AN ADDITIONAL PERIOD OF FIVE YEARS.

This is not a suit against the City under a contract by the City to pay for work done or service performed by the plaintiff. In such a case, as shown by the authorities cited by the Circuit Court of Appeals in its first opinion (147 F. (2d) 711), where the agreement provides that the work is to be done or the service performed to the satisfaction of the one for whom such work or service is to be performed or rendered, he cannot arbitrarily refuse to pay therefor on the ground that the work or service was not satisfactory to him if a reasonable man should have been satisfied with it. Obviously, in a suit to compel the renewal of an agreement, which renewal is to be made only if conditions are satisfactory, either party has the right to refuse to renew the agreement on any ground, with reference to any conditions, which he may deem unsatisfactory, and no court has the right to substitute its judgment for that of such party as to whether conditions were or should have been satisfactory to such party.

However, the evidence in this case is conclusive that the City was fully justified in its refusal to renew the agreement on the ground that conditions were not satisfactory to it at the expiration of the agreement of November 10, 1939. The Yeast Company had, during the entire term of the agreement, and was, at the time of the expiration of the agreement, discharging into the storm sewer waste from its Yeast plant from which arose most obnoxious and sickening odors which permeated the air of the City. That was in violation of the agreement, and it certainly cannot be said, with reason, that those conditions should have been satisfactory to the City because the Yeast Company had endeavored to remove the odors but was unable to do so because (1) when it first began to discharge the waste into the storm sewer there was no known method for removing the same, and (2) because of restrictions on the use of critical material arising from World War II it had not been able to install equipment which would have removed the obnoxious odors.

Those excuses have no bearing on the question whether conditions were, or should have been, satisfactory to the City at the expiration of the agreement of November 10, 1939.

2.

THE RIGHT OF THE YEAST COMPANY, IF ANY, TO RENEWAL OF THE AGREEMENT MUST BE DETERMINED AS OF NOVEMBER 10, 1944.

The express terms of the agreement, without qualification, were that the agreement was subject to renewal, "providing conditions are satisfactory to both parties hereto, at the expiration of this agreement." The Master's 18th finding of fact that "the plaintiff has eliminated

all unpleasant odors from the effluent arising from its manufacture of yeast," (R. 245), and his 21st finding of fact that "the manufacture of yeast by the plaintiff and disposal of the effluent therefrom is not now creating a public nuisance in the City of Crystal Lake," (R. 245), very evidently led him to recommend the issuance of the injunction herein.

Section Eleventh of the agreement expressly provided that the agreement would expire five years from the date thereof, but would be subject to renewal providing conditions were satisfactory to both parties at the expiration of that agreement—not more than a year thereafter. That the Master considered that the agreement was renewable only at the expiration of the agreement of November 10, 1939, is apparent from his recommendation, which was adopted by the District Court, that the City should be enjoined from preventing the discharge of the waste into the storm sewer until November 10, 1949, being five years after the expiration of the agreement of November 10, 1939.

3.

THE AGREEMENT UPON WHICH THIS SUIT WAS BASED WAS *ULTRA VIRES* THE POWERS OF THE CITY.

Irrespective of the rule that a City cannot grant to an individual or private corporation the right to discharge into its storm sewer waste from which obnoxious odors will escape through the storm water openings and permeate the air of the City to the great discomfort of its residents, it is an universal rule of law that no action taken by a city council in the exercise of governmental powers is binding upon its successors. When the agreement of November 10, 1939 expired there was a different mayor and dif-

ferent members of the City Council than those holding office when that agreement was made. (R. 158, 177, 179, 182.) No agreement made or authorized by the Mayor and City Council in 1939 with reference to the use of the storm sewer by a private corporation could be binding upon the new mayor and new City Council on November 10, 1944.

The hands of successors cannot be tied by contracts relating to governmental functions. *McQuillan Municipal Corporation* (2nd ed.) vol. 3, Sec. 1356, p. 1282; *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 282; *Omaha Water Co. v. City of Omaha*, 147 Fed. 1, 5; *Griffin v. Oklahoma Natural Gas Corporation*, 37 Fed. (2d) 545, 548; *Illinois Power & Light Corporation v. City of Centralia*, 11 Fed. Supp. 874, 885; *Trustees of the Illinois Central Hospital for the Insane v. City of Jacksonville*, 61 Ill. App. 199, 202.

Therefore, the City Council, as it existed at the expiration of the agreement on November 10, 1944, was not bound by that contract to renew, or authorize the renewal, of the agreement for an additional period of five years.

The regulation of the use of a storm sewer is a governmental power. Sections 1, 35 and 36 of Article 23 of the Illinois Cities and Villages Act (Illinois Revised Statutes, 1943, State Bar Association ed., pp. 406, 408, and Sections 1 and 7 of Article 60 of the same act, pp. 448, 449). The City is not engaged in a business enterprise in the installation and use of a storm sewer, the purpose of which is to provide a means for the discharge of rain water from the streets of the City, and not for the discharge of waste from industrial plants.

4.

THERE WAS NO CONSIDERATION FOR THE ALLEGED AGREEMENT BY THE CITY TO RENEW THE AGREEMENT OF NOVEMBER 10, 1939.

The agreement did not provide for the payment of any consideration by the Yeast Company for the use of the storm sewer. Lutz, the Yeast Company's Vice President, testified that the Yeast Company does not pay anything for the use of the storm sewer, and that "we have never paid anything." (R. 105.) Mayor Krause also testified that the Yeast Company does not pay anything to the City for the use of the storm sewer (R. 164) and the testimony of Alderman Meier is to the same effect. (R. 211.)

Notwithstanding that undisputed evidence, the Master found (R. 244), and the finding was adopted by the District Court and approved by the Circuit Court of Appeals, that the agreement of November 10, 1939, was based upon good and valuable consideration on the part of both the Yeast Company and the City.

The Yeast Company did not acquire and equip its plant as the result of any agreement with, or promise by, the City that the Yeast Company could use the storm sewer for the discharge of its waste or sewage. It was not until long after the Yeast Company had acquired and equipped its plant at a cost of \$200,000 (R. 76, 90), that it conceived the idea of using the storm sewer for the discharge of its cooling water and sewage. (R. 91-92.) Thus it appears from the undisputed evidence of the Vice-President of the Yeast Company that the Yeast Company did not acquire and equip its plant as the result of any promise or agreement by the City or any of its officers that the Yeast Company might or could use the storm sewer as a means for the discharge of its waste.

THE FACT THAT WORLD WAR II MAY HAVE IMPEDED THE YEAST COMPANY IN ITS CONSTRUCTION OF THE SO-CALLED CLOSED SYSTEM IS NO EXCUSE FOR ITS FAILURE TO COMPLY WITH THE AGREEMENT OF NOVEMBER 10, 1939.

This is not a suit against the City brought on account of *its* failure to perform an agreement, but is brought by the Yeast Company upon a contract to enforce compliance therewith by the City notwithstanding the Yeast Company failed to perform its part of the agreement.

The established law is that if one *is sued* on account of his failure to perform a contract, he may defend on the ground that performance was prevented by war conditions or acts of the Government in the prosecution of the war; but if one *sues* upon a contract requiring performance by him, before he is entitled to the relief sought he must show performance on his part and will not be permitted to set up that he was prevented from performing the contract by war conditions or acts of the Government in the prosecution of the war. *Prescott & Co. v. J. B. Powles & Co.*, 193 Pac. 680; *Remy v. Alds*, 240 Pac. 216, 218; *Brooke Tool Manufacturing Company v. Hydraulic Gears Company*, 89 L. J. K. B. N. S. 263; 9 A. L. R. 1507; *Felder v. Oldham*, 199 Ga. 820; 35 S. E. (2d) 497, 164 A. L. R. 415.

The case last cited was decided in October, 1945, and, in principle, is identical with our case.

However, cases which consider the right of a party to recover or escape liability for failure to perform a contract on account of a war have no application to this case, where the agreement provided that the agreement was subject to renewal if conditions were satisfactory to both

parties. If conditions were unsatisfactory to the City upon the expiration of the agreement of November 10, 1939, for any reason or from whatever cause, it certainly had the right to refuse to renew the agreement for an additional period of five years.

On account of the manifestly erroneous, inequitable and unjust decision of the Circuit Court of Appeals, affirming the decree of the District Court, which was based upon facts wholly unsupported by the evidence and conclusions of law which are clearly erroneous, we ask this Court to grant the petition for certiorari herein and to consider and decide the questions involved herein.

Respectfully submitted,

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DAILY, DINES, WHITE & FIELDER,

Of Counsel for Petitioner.

February 16, 1949.

APPENDIX I.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 8730. OCTOBER TERM, 1944, JANUARY SESSION, 1945.

NATIONAL GRAIN YEAST CORPORATION,
a Corporation of New Jersey,
Plaintiff-Appellant,

vs.

THE CITY OF CRYSTAL LAKE, a Mu-
nicipal Corporation of Illinois,
Defendant-Appellee.

} Appeal from the Dis-
trict Court of the
United States for
the Northern Dis-
trict of Illinois,
Eastern Division.

March 1, 1945.

Before EVANS and MAJOR, *Circuit Judges*, and BRIGGLE,
District Judge.

EVANS, *Circuit Judge*. We are here reviewing an order which vacated a previously entered temporary restraining order and which also denied plaintiff's application for a preliminary injunction, in a suit brought to restrain defendant from shutting off its storm sewers and thus prevent plaintiff from operating its plant which requires an outlet for waste waters used in its process of yeast making.

Briefly stated, this is the story: Plaintiff filed a verified complaint upon which a restraining order was entered after defendant had filed an affidavit made by its mayor. No answer was filed by the defendant. A temporary restraining order was entered. After oral argument the court made findings without further evidence and refused findings pro-

posed by plaintiff. It then entered an order vacating the restraining order, and refusing plaintiff's motion for a temporary injunction. This appeal followed.

The Facts. Plaintiff is a New Jersey company which manufactures bakers yeast. In 1938 it decided to locate a branch factory in the west and in the vicinity of Chicago because the perishable nature of yeast made its shipment from the east impracticable, save in expensive refrigerator cars. It selected an existing, unused dairy plant in the city of Crystal Lake and entered into negotiations with the officials of that city in regard to its selection of a situs. It represented that it would employ 35 to 40 persons permanently, and it would spend a substantial sum of money in the city when it began operations.

Plaintiff invested \$200,000 in its Crystal Lake plant and equipment, and the equipment is unfit for use in any other type of business.

In the process of making yeast, heat is generated which must be overcome. Water is used as the cooling agent. There is also waste water in the process, which has an objectionable odor. It is over the presence of this objectionable odor and its elimination that differences arise. This problem was made known to defendant before plaintiff located at Crystal Lake. In the treatment of this waste, plaintiff first utilized at defendant's suggestion, several lagoons located on a seven acre tract outside the city. They proved inadequate, so, under a contract with the city, it discharged the cooling, and waste, waters into the storm sewers of the city.

The contract, first negotiated in January, 1939, was re-executed, November 10, 1939, for a term of five years. The renewal provision, paragraph 11, is the covenant of major importance in this controversy. It provided:

"This Agreement shall extend for a period of five years, and expire five years from the date hereof, but is subject to renewal, *providing conditions are satisfactory to both parties hereto, at the expiration of this Agreement.*"

The City Council, by resolution, has declared that the odors are a nuisance, and that conditions have been unsatisfactory since the beginning of the contract, and that plaintiff has done nothing to abate the nuisance during the existence of the contract.

Plaintiff paints a different picture of the situation and attempts to avoid any culpability. It insists it has done everything within its power to minimize and eradicate the odors incident to the operation of its plant. Its complaint states:

(1) It hired, in November, 1938, two bacteriologists who were authorities on the treatment of industrial waste. It constructed a small plant for use in their experimentations, and plaintiff excavated two large lagoons on a tract of land outside the city. This cost plaintiff large sums of money.

(2) The wastes were treated before being discharged into the storm sewer; the waste thus treated at all times met the purification standards of the Sanitary Water Board of the State of Illinois.

(3) That defendant knew, at the time the contract was made, that science had not perfected a means for entirely eliminating the odor.

(4) On the advice of experts whom plaintiff consulted, it built a "trickling filter" and improvements thereon.

(5) In the course of its research it came upon a so-called closed system, a new and more modern method of removing odor, consisting of two large closed concrete tanks technically called anaerobic digesters; that the construction of such tanks and the apparatus used in connection therewith required a large quantity of steel and materials critical in the war effort.

(6) Plaintiff informed defendant of this new system and its belief that the apparatus would completely dispel the objectionable odors, but defendant, nevertheless, thereafter called a meeting of its Council and passed a resolution whereby it refused to renew its contract "in any event." "That such action by the City embarrassed and *greatly impeded* the plaintiff and prevented it from procuring the

approval which the plaintiff could otherwise have obtained, of the Sanitary Water Board of the State of Illinois, for the installation of such closed system, and from obtaining priorities from the War Production Board * * * for critical materials required for the installation of such closed system."

(7) Plaintiff received notice "from the War Food Administration * * * that it would not recommend approval of Plaintiff's priority, without submitting evidence from the proper officials of the City of Crystal Lake, disclosing that it would permit the plaintiff to operate after the installation of such equipment."

(8) The city and the Sanitary Board later did join* in requesting the issuance of the priorities, but the reply of the Federal authorities was "that the problem of the plaintiff was not, in the opinion of the Administration, of sufficient magnitude to warrant the use, *at said time*, of the materials sought in the application."

(9) Plaintiff then requested Washington officials to confer with the city officials, to urge the defendant to permit the plaintiff to continue to use existing facilities until the end of the war, but defendant refused the request thus made.

(10) Plaintiff received the approval of its priority application in July, 1944, with the limitation that it must be made use of prior to October 31, 1944. Plaintiff at once proceeded with bids for the work and was ready to accept them and proceeded with the construction of the closed system, which would take five months, when "Defendant re-

* The Mayor of Crystal Lake wrote this letter to the War Food Administration, May 11, 1944.

"The National Grain Yeast Corporation, with a plant at Crystal Lake, is contemplating the building of a disposal plant to treat their waste materials, and to produce an effluent which will be non-odorous.

"While there has been some complaint in the past relative to the offensive odor, it is believed that the proposed treatment plant will eliminate all trouble and the City is willing, and anxious, to cooperate with the yeast corporation in this matter.

"In view of the above it is requested that The National Grain Yeast Corporation be granted the necessary priorities, and release of materials, for the proposed treatment plant.

"Trusting this request will receive favorable action, I am
"Very truly yours, * * *

fused to permit Plaintiff to have said time so required to proceed with the construction and to complete the same, and notified the Plaintiff that it was prepared to, and would, close the shut-off valve at the effluent outlet line on November 10, 1944 and would not extend said time; that, as a result of such action, the Plaintiff was not able to proceed to install and complete such closed system as it otherwise would have been able to do; that had the Plaintiff not been prevented by the war conditions and by the action of the Defendant, it would have, prior to November 10, 1944 performed all 'conditions' satisfactory to the Defendant within the provision of Paragraph Eleventh * * *." Plaintiff is manufacturing a product essential to the war effort.

Ordinarily, the district court's action on an application for a temporary injunction is well-nigh final. It will be modified or vacated only when it appears there was an abuse of discretion. (*U. S. v. Corrick*, 298 U. S. 435.) However, in this appeal, since the trial court's action was based solely upon the verified complaint and an opposing affidavit, and no oral evidence was offered, we are in the same position as was the district court. Even so, we are, in a sense reviewing the exercise of the trial court's discretion.

We are convinced from the record before us that plaintiff did not "wholly fail to treat all of the effluent discharged from its treatment plant so as to prevent any unpleasant odors from arising." It must be, and is, assumed, that there are odors and they are obnoxious. As such, they constitute a "condition unsatisfactory" to the City, which would ordinarily justify it in refusing to renew the contract with plaintiff. Also, we must accept the showing that *plaintiff tried to overcome the condition and was hindered in its effort by the defendant.**

Were we looking at paragraph 11 of the contract, disassociated from the circumstances of this case, we might agree that a contract "subject to renewal, providing conditions are satisfactory to both parties hereto" was an unfortunate trouble-provoking clause. At least the word

**Cheney v. Libby*, 134 U. S. 68; *Van Buren v. Digges*, 11 How. 461; *Williams v. Bank of U. S.*, 2 Pet. 96; *Bank of Col. v. Hagner*, 1 Pet. 455.

"satisfactory" offers a basis for dispute, and doubtless gave defendant the impression that its right to refuse renewal existed regardless of the reasons (or the prejudices) behind it.

Whether "the satisfaction" is to be judged by the promisee's standards, or by the standards of reasonableness, often depends upon the nature of the subject of the contract—such as a portrait, or, on the other hand, the construction of a building. For cases involving the application of the standard of *reasonableness* of satisfaction as opposed to arbitrariness, see *Erickson v. Ward*, 266 Ill. 259, and *Keeler v. Clifford*, 165 Ill. 544. In the former case it was said:

"Where a building contract provides for the construction of a building according to certain plans and specifications prepared by the owner's architect, in a good, workman-like and substantial manner, 'to the satisfaction' means a satisfaction reasonably, and not merely arbitrarily, exercised."

In the latter case, it was said:

"* * * where a contract is required to be done, to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man; the plain construction of the contract in this regard is, that the work was to be completed in accordance with the contract, in such a manner that appellant, as a reasonable man, ought to be satisfied with it."

Williston on Contracts, Sec. 675 A, states the rule thus:

"Where a promise is conditional, expressly or impliedly, on his own satisfaction, he must give fair consideration to the matter. A refusal to examine the promisor's performance, or a rejection of it, not in reality based on its unsatisfactory nature but on fictitious grounds or none at all, will amount to prevention of the condition and excuse it. * * * Frequently, no doubt, on a true interpretation of provisions for satisfactory performance, reasonable satisfaction, * * * of the promisee is all that is required."

Here we have several persuasive factors which give strength to plaintiff's contention in favor of its right to renewal: (1) Plaintiff invested \$200,000 on the assumption that it was going to continue indefinitely in business; (2) Defendant before the execution of the contract was cognizant of the problem of odors in the manufacture of yeast, and suggested the possible use of the existing lagoons as a means of elimination of the odors; (3) Defendant wanted the financial benefit which the location of the plant in the City would give it, and encouraged, if it did not induce, the plaintiff to locate there; (4) Plaintiff tried repeatedly to eliminate the odors by scientific research, at great expense to itself.

We base our conclusion that plaintiff should be given a temporary injunction largely on defendant's refusal to cooperate with plaintiff. By so doing, it defeated the adoption of the newly discovered method of entirely eliminating the objectionable odors. This refusal to cooperate was arbitrary and bordered on bad faith. It precludes defendant, at least so far as this ruling on this temporary injunction is concerned, from a reliance on noncompliance with a required condition of the contract.

The right to renewal was predicated upon a mutual continuance of satisfactory conditions—but if one side was unable to render conditions satisfactory because of the action of the other party, unsupported by reason, the latter should not be permitted to offer the nonperformance of the adversary as a basis for non-renewal.

Our conclusion is based on the showing at this early stage of the litigation. There is necessity for proof in support of the respective assertions to determine final disposition of the suit. But, in the meantime, there is on the one side, real destruction of property, if the injunction be denied while there is no insufferable loss or damage if plaintiff be permitted to continue making bakers yeast—a product found essential to the war effort. Should the actual proof disclose bad faith on the part of the plaintiff, lack of sincere effort to comply with contract provision re-

quiring treatment of the odorous wastes, then defendant's refusal to renew the contract will be sustained.

At this stage of the litigation, however, we cannot say, on the incomplete record before us, that plaintiff failed to make the required effort to successfully treat its waste. Rather, there is ample allegation of the numerous endeavors it made to eliminate the odor, and of defendant's lack of cooperation in procuring installation of a process which promised complete, or nearly complete, eradication of the odor.

In reaching this conclusion, we, holding court in Chicago, are aware that life in a large city is accompanied by more noise, more dirt and more odor than we like. We are justified in our efforts to lessen them, just as the citizens and officers of Crystal Lake are justified in their efforts to remove obstacles to health and enjoyable living. This worthy desire, however, is not strengthened in the opinion of neutrals by angry efforts which defeat rather than promote their objective. Nor can the court, nor should the defendant, ignore the effect of the World War on efforts of parties to comply with contract obligations and requirements.

The extent to which parties may justifiably expect relief in a court of equity upon a showing that the failure to perform was because of inability to secure priorities, etc. due to the War, presents a question upon which final judicial pronouncement has not been made. (See 152 A. L. R. 1447; 151 A. L. R. 1447; 150 A. L. R. 1413; 149 A. L. R. 1447; 148 A. L. R. 1382; 147 A. L. R. 1273; 137 A. L. R. 1199.)

It is our belief that courts of equity will not close the door of relief to a party who has diligently and in good faith attempted to complete its contract but who has been wholly or in part prevented from so doing because of the first demands and requirements of the Government in the prosecution of the War.

Plaintiff's obligation in the case before us is of this character.

The order of the District Court is Reversed with directions to proceed in accordance with the views here expressed.

APPENDIX II

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, OCTOBER SESSION, 1948.

No. 9631

NATIONAL YEAST CORPORATION, formerly NATIONAL GRAIN YEAST CORPORATION, a corporation of New Jersey,

Plaintiff-Appellee.

vs.

THE CITY OF CRYSTAL LAKE,
Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 8, 1948.

Before SPARKS and MAJOR, *Circuit Judges*, and BRIGGLE, *District Judge*.

BRIGGLE, D. J. Plaintiff-appellee is engaged in the manufacture of baker's yeast in the City of Crystal Lake, Illinois. By virtue of a contract entered into on November 10, 1939, between the Yeast Company and the City, expiring five years from the date thereof, plaintiff discharged its waste into the storm sewers of the city and continues to do so regardless of the expiration date of the contract. The District Court has awarded the plaintiff an injunction restraining the defendant from closing the shut-off valve in the plaintiff's effluent line between its plant and the storm sewer of the city, and from interfering in any manner with the discharge of the plain-

tiff's waste into such storm sewer prior to November 10, 1949, except under the special circumstances provided for in the contract. This on the theory that the City acted arbitrarily and unreasonably in its refusal to give effect to a proviso of the contract making it subject to renewal for a further term of five years "providing conditions are satisfactory to both parties." The lower court held that plaintiff's delay in the treatment of its effluent so as to eliminate offensive odors, as provided in the contract, was to be excused on account of the war and the non-cooperative conduct of defendant.

This case was before us in March, 1945 (Reported in 147 Fed. 2d 711) on an appeal from a refusal of the District Court to grant plaintiff a temporary injunction. For a further statement of the facts reference is made thereto. The decision of the District Court had at that time been made upon the pleadings and an affidavit submitted by defendant, and after a consideration of the facts as disclosed by the pleadings and the affidavit we reversed the decision of the District Court and remanded the cause for a full hearing upon the evidence.

Upon remandment an amended complaint was filed bringing the allegations of fact to date, and the defendant then challenged, for the first time, the jurisdiction of the Court. This challenge was based upon the assertion by the defendant that the Crystal Lake Building Corporation, an Illinois corporation, was a necessary and indispensable party to the proceeding, that its interests were antagonistic to that of the defendant city and if made a party to the proceeding and properly aligned with plaintiff it would have the effect of defeating jurisdiction because there would then be no diversity.

To show the applicability of this contention it is necessary to refer briefly to the contract between the plaintiff and defendant of November 10, 1939. At that time, the Yeast Company being hard-pressed for a method of suitable disposition of its effluent, entered into a contract with the city whereby the city agreed to allow the Yeast Company to connect its disposal line to the storm sewer of the

city. It was agreed that the plaintiff would treat all waste emptied into such storm sewer so as to eliminate offensive odors and in a manner to meet the approval of the Sanitary Water-Board of the State of Illinois; that a shut-off valve would be installed to which the City would have free access for the purpose of shutting off such waste matter in the event of noncompliance and for other emergency reasons, such as a heavy rain storm or an overcharging of the capacity of the sewage system. All paragraphs and provisions of this contract relate to the covenants of the Yeast Company and the City of Crystal Lake with the single exception of paragraph 7. By paragraph 7, the Crystal Lake Building Corporation, at that time the holder of the legal title to the real estate upon which the Yeast Company's plant was situated, together with the Yeast Company, agreed to indemnify the City of Crystal Lake against any damages it might sustain by reason of any claims filed against the City growing out of the discharge of such effluent into the storm sewer of the City, and the Yeast Company and Building Company agreed not to further encumber their plant.

Paragraph 11 of the agreement provided that the agreement would expire in five years but was subject to renewal "providing conditions are satisfactory to both parties hereto at the expiration of this agreement."

The Crystal Lake Building Corporation is something of a figurehead in the entire transaction, being a wholly-owned subsidiary of the Yeast Company, organized for the single purpose of receiving title to the real estate upon which the Yeast Company contemplated the equipment of a plant for the operation of its business. Before the controversy arose between the Yeast Company and the City, and long prior to the institution of the proceedings herein, the Building Corporation had divested itself of such real estate by conveyance to the Yeast Company, and the Yeast Company had subsequently discharged all liens against the property. There of course remained as a barrier to the dissolution of the corporation, the Building Company's contingent liability under paragraph 7 of this contract

concerning any possible claims that might be filed against the City for causes of action arising prior to November 10, 1944. It is not contended that any such claims have ever been filed. Under these facts, the District Court declined to make the Building Corporation a party to the proceeding, and this question of jurisdiction is now before us for review for the first time.

The City contends that the Building Corporation was an indispensable party for the reason that its obligations under the contract were such that a final decree could not be made without affecting its interests, and that its interests being antagonistic to the City it would if brought in defeat jurisdiction, and cites *Shields v. Barrow*, 58 U. S. 130; *Indianapolis v. Chase National Bank*, 314 U. S. 63, and numerous other decisions of lower courts.

The *Chase National Bank* case is a most interesting 5-4 decision in which jurisdiction was denied following a contrary holding by this Court. The facts are so different from our own case that its value here is doubtful except for the fundamental principles declared in the majority opinion. The Court there said:

"As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an 'actual' . . . 'substantial', . . . controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. . . . Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' . . . Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests' exists, is therefore not to be determined by mechanical rules. It must be ascer-

tained from the 'principal purpose of the suit', * * *
and the 'primary and controlling matter in dispute.'
* * *,"

So here the question of whether the Building Corporation was a necessary party must be determined from "the realities of the record."

There can be no question but that the decree of the Court herein is ineffective to place any additional burden upon the Building Corporation. Its obligation under paragraph 7 of the agreement expired on November 10, 1944, and as asserted by the City it could successfully defend against any claim arising subsequent to that date. Its present contingent liability to respond in damages by reason of suits against the City for acts arising between November 10, 1939 and November 10, 1944 remains unaffected except by any appropriate statute of limitations. Its position seems to have been that of a guarantor or an indemnitor and thus was made a party to the agreement because at that time it held title to the Yeast Company property. This property has since been conveyed to the Yeast Company and the potency of the Building Company as an indemnitor has ceased to exist, but its contingent liability has not and cannot in the least be affected by the decree herein.

If it is conceded that the effect of the Court's decision herein is to award the plaintiff a renewal of such contract from November 10, 1944 to November 10, 1949 it can, of course, be effective only as between the Yeast Company and the City, but this would in no sense affect the interest of the Building Company. The question of whether the Yeast Company should have upon the entry of the decree herein furnished the City with further sureties for the faithful performance of its contract to indemnify the City for the period from November 10, 1944 to November 10, 1949, was a proper subject for consideration of the Court at the time of the decree herein if it had been presented. If the City in this renewal of its obligation to receive the effluent from the Yeast Company had believed that it was

entitled to be further indemnified other than by the obligation of the Yeast Company, we presume it could have so indicated to the trial court and the trial court would undoubtedly have had authority under its equity jurisdiction to have made the injunction order contingent upon the Yeast Company furnishing further security. The surety could have been any person or corporation qualified to act. The fact that the Building Company had for the preceding five years been the indemnitor can make no difference in this respect. A "collision of interests" between the City and the Building Corporation can only arise if and when the City is required to defend a suit for damages growing out of the subject matter of the contract, but there is no collision of interests in the relief sought in this proceeding. It is our judgment that the Building Corporation is neither a necessary nor an indispensable party in this suit and that the District Court correctly determined that it had jurisdiction.

As we have already noted when the case was before us on the former hearing, no evidence had been heard. We there stated:

"Our conclusion is based on the showing at this early stage of the litigation. There is necessity for proof in support of the respective assertions to determine final disposition of the suit."

Upon remandment, the District Court referred the cause to a Special Master who, after extended hearings, found the facts and separately stated his conclusions of law.

Among other things, the Special Master found as follows:

That, in the course of its research (for a method of elimination of odors from its effluent) the Plaintiff came upon a so-called "closed system", a new and more modern method of removing odor, consisting of two large closed concrete tanks, technically called anaerobic digesters; that the construction of such tanks and the apparatus used in connection therewith required a large quantity of steel and materials critical in the War effort.

That, unforeseeable by the parties thereto at the time of the execution of the Contract of November 10, 1939, between the Plaintiff and Defendant, the United States of America subsequently became engaged in wars with foreign enemies and restricted the use of critical materials, which prevented the Plaintiff from obtaining materials necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast.

That the Plaintiff was prevented, wholly or in part, from completing its Contract with the Defendant prior to November 10, 1944, by the wars in which the United States of America was engaged and the restrictions upon the use of critical materials.

That the Defendant failed and refused to cooperate with the Plaintiff in its efforts to eliminate unpleasant odors from the effluent from its manufacture of yeast.

That the failure and refusal of the Defendant to cooperate with the Plaintiff in its efforts to obtain priority permits, hindered and prevented the Plaintiff from obtaining materials and authorization necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast.

That the refusal on the part of the Defendant to cooperate with the Plaintiff in the latter's effort to eliminate unpleasant odors from the effluent from its manufacture of yeast, wholly or in part, prevented Plaintiff from completing its agreement with the Defendant prior to November 10, 1944.

That the Plaintiff has carried out and performed each term, provision and condition of the Contract with the Defendant, dated November 10, 1939.

That the Plaintiff has eliminated all unpleasant odor from the effluent arising from its manufacture of yeast.

That the Plaintiff, prior to the date upon which it filed its Complaint in the above entitled cause, was the sole owner of the properties in and near Crystal

Lake upon which the yeast involved in this case was manufactured and the effluent therefrom treated.

That, neither on the date when the Complaint in the above entitled cause was filed nor thereafter, did the Crystal Lake Building Corporation have any right, title or interest in or to the properties or any part thereof, in and near Crystal Lake in which yeast was manufactured by the Plaintiff and the effluent therefrom treated.

That the manufacture of yeast by the Plaintiff and disposal of the effluent therefrom is not now creating a public nuisance in the City of Crystal Lake.

These Findings of the Special Master were, on hearing, adopted by the District Court as the Findings and Conclusions of the Court. Upon examination of the record we find that such Findings of Fact have substantial support in the evidence and must be accepted. (Rule 52a of the Rules of Civil Procedure.)

The facts thus found were before us on the former appeal only as allegations appearing in the pleadings but have now on hearing of evidence been resolved by the lower Court adversely to defendant. All questions of law now presented and argued could have been presented on the former hearing, and most of them were except the jurisdictional question. The question of jurisdiction being a proper subject for consideration at any time we have herein considered and disposed of the contentions in relation thereto. In reference to the other principal points raised in the briefs and orally argued before the Court our views thereon found expression in our previous opinion written by our former associate, Judge Evans, and we find no occasion to modify or extend the views there expressed.

The decree is affirmed.

APPENDIX III.

Revised Statutes of Illinois Re Powers of City Council Over Use of Storm Sewers.

Section 1 of Article 23 of Cities and Villages Act (Illinois Revised Statutes, 1943, State Bar Association ed., p. 406):

“The corporate authorities of a municipality shall have the powers enumerated in Sections 23—2 to 23—107, inclusive.”

Section 35 of the same Article:

“To construct, repair, and regulate the use of culverts, drains, sewers, and cesspools.”

Section 36 of the same Article:

“To regulate the construction, repair, and use of cesspools, cisterns, hydrants, pumps, culverts, drains, and sewers.”

Section 7 of Article 60 of same Act:

“The corporate authorities of any municipality that owns and operates or that may hereafter own and operate a sewerage system constructed or acquired under the provisions of any law of this State have the power to make, enact and enforce all needful rules and regulations in the construction, acquisition, improvement, extension, management, and maintenance of its sewerage system and for the use thereof.”

Section 1 of said Article 60:

“When used in this article the term ‘sewerage system’ means and includes * * * the disconnection of storm water drains and constructing outlets therefor * * *.”

THE CITY OF CRYSTAL LAKE, a MICHIGAN CORPORATION,

**NATIONAL YEAST CORPORATION, INCORPORATED IN ILLINOIS,
GRAIN YEAST CORPORATION, a NEW JERSEY CORPORATION,**

**ON PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

**BRIEF OF THE NATIONAL YEAST CORPORATION
IN OPPOSITION.**

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Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 587.

THE CITY OF CRYSTAL LAKE, AN ILLINOIS MUNICIPAL
CORPORATION,

Petitioner,

vs.

NATIONAL YEAST CORPORATION, FORMERLY NATIONAL
GRAIN YEAST CORPORATION, A NEW JERSEY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**BRIEF OF THE NATIONAL YEAST CORPORATION
IN OPPOSITION.**

OPINIONS BELOW.

The District Court did not render any opinion in this case.

An early order of the District Court, denying the Yeast Corporation's motion for a preliminary injunction (R. 30-31), was reversed by the Court of Appeals for the Sev-

enth Circuit, and the District Court was directed "to proceed in accordance with the views here expressed" (147 F. (2d) 711; Pet. 29-36).

Subsequently, after full hearing before a Master in Chancery (R. 73-249), the District Court entered an Order on January 9, 1948, providing, in part, "That the Preliminary Injunction entered in this cause on April 13, 1945 (R. 39-40), be, and the same hereby is, made permanent until November 10, 1949 * * *" (R. 261). This Order was affirmed by the Court of Appeals for the Seventh Circuit, which rendered an opinion that has not yet been reported (R. 296-302; Pet. 37-44).

JURISDICTION OF THIS COURT.

The judgment of the Court of Appeals was entered on November 8, 1948 (R. 303). The City's Petition for Re-Hearing was denied, without an opinion, on December 7, 1948 (R. 305). The Petition for a Writ of Certiorari was filed by the City in this Court on February 23, 1949, being more than ninety days after the entry of judgment by the Court of Appeals, but within ninety days after denial of the Petition for Re-Hearing (see Title 28, United States Code, section 2101). The City seeks to invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code (now Title 28, United States Code, section 1254).

QUESTIONS PRESENTED.

The principal question presented is whether the United States District Court had jurisdiction of this proceeding on the ground of diversity of citizenship. Subordinate questions are:

(a) Whether, under all of the pertinent facts, the Yeast Corporation was entitled to an extension of its contract for use of the City's storm sewers to November 10, 1949.

(b) Whether the contract in question was *ultra vires* the powers of the City.

(c) Whether the contract in question was based upon good and valuable considerations.

STATEMENT.

The National Yeast Corporation manufactures baker's yeast at its main plant in Belleville, New Jersey (R. 74), and, since 1939, at another plant in Crystal Lake, Illinois. Many pertinent facts are found in negotiations before November 10, 1939, when the contract here in question was executed.

The Yeast Corporation realized that the establishing of its branch business in a new community involved more than merely acquiring title to real estate and installing equipment. There was the possibility of restrictions or prohibitions by zoning ordinances. Quite vital, also, was adequate provision for satisfactory disposal of the waste from its manufacturing process and of large quantities of water used for cooling (R. 74-75). For those reasons, the con-

tract by which the Yeast Corporation ultimately acquired title to its property in Crystal Lake contained a clause for cancellation of the purchase contract "if it be found that there be any [zoning] ordinance of the township of Crystal Lake, or any other objection upon the part of the city authorities" (see R. 83, 88, 74, 284).

Thereafter, the Yeast Corporation conferred with the City of Crystal Lake on several occasions before consummating the purchase of the Crystal Lake plant site from the Bowman Dairy Company (R. 74, 90, 107). The fact that the manufacture of yeast produces unpleasant and obnoxious odors was brought to the attention of the City (R. 75, 107). The need of the Yeast Corporation for adequate sewerage facilities for the disposal of its waste and cooling waters was discussed in detail. The Yeast Corporation was told by the City that the Bowman Dairy Company had discharged its waste on a seven-acre tract a mile from the factory site (outside of the city limits of Crystal Lake) and was assured that, if respondent ever had any difficulty in disposing of its effluent and water in that manner, they could be discharged into the sanitary sewer and the City's new treatment plant then about to be build by the City (R. 75, 90, 228-229). The Yeast Company relied on those statements and consummated the purchase from Bowman of the Crystal Lake plant site and the right to use for waste purposes the seven-acre country tract (R. 75-76).

In these conferences, the City advised the Yeast Corporation that a large number of the citizens of Crystal Lake then were on the relief rolls and that the City was anxious to get them removed therefrom. Frequent inquiries were made by the City as to how many local persons would be employed by the Yeast Corporation and the amount of its average weekly payroll (R. 75, 90-91, 107-108). The interest and desire of the City to have the Yeast Corpora-

tion establish a plant in Crystal Lake were epitomized by one of its Aldermen when he said that the "stink" (from the Yeast Corporation's effluent) could not be bad enough to stop employment of at least thirty people, because that would take at least thirty families off relief (R. 107-108). The City then wanted and urgently needed for its citizens, the employment and wages that would be available for those citizens if the Yeast Corporation established a manufacturing plant there.

It is worthy of comment, too, that the contract here in question does not grant any special privileges which would prevent a like grant to others. It is not an exclusive license or privilege in any sense. Furthermore, the contract does not provide for any use of the storm sewer when it is needed by the City to carry off surface waters or for repair (Paragraph 3 of contract; R. 250). In other words, this contract permits the Yeast Corporation to use only the excess capacity of the storm sewer, that is, to use it only when, due to lack of precipitation, little, if any, of the capacity is used or needed by the City or its residents.

Subsequently, it developed that discharge of the Yeast Corporation's effluent into the sanitary sewer might create problems at the municipal sewage treatment plant (R. 84). The use of the storm sewer, as provided in the contract ultimately executed, instead of the sanitary sewer as originally contemplated, was a solution suggested by the Sanitary Water Board of the State of Illinois and the Yeast Corporation as a means of relieving the City from the problems that might have been created at its municipal sewage treatment plant by fulfillment of the representations made by the City to the Yeast Corporation (R. 91-92, 93, 100).

The City, pursuant to a resolution of its Council, signed a contract dated January 18, 1939, and submitted it to the Yeast Corporation for signature. Prior to that time, Al-

bert Sabath, attorney for the Yeast Corporation, had negotiations with the City in regard to the proposed contract. The first contract submitted to him was that dated January 18, 1939 (R. 13-16, 77). Thereafter, the Yeast Corporation found that it would be impossible to procure the bond required by Paragraph Seventh of that contract (R. 106). That contract was never executed by the Yeast Corporation (R. 116).

The third paragraph in said proposed contract also contained a provision that the City might close the shut-off valve at the Yeast Corporation's outlet sewer line upon giving fifteen minutes' notice (R. 250-251); such provision had been inserted in order to protect the City against overloading its storm sewer during any heavy rainstorm. Sabath objected to these provisions and also asked that the permissible discharge be increased from 350 gallons to 500 gallons per minute. Subsequently, the City agreed to such modifications and requested Sabath to redraft the contract to incorporate those changes (R. 106). Pursuant to that request, Paragraphs First to Tenth of the contract were rewritten by Sabath; the contract of November 10, 1939, embodied the gist of the original contract (R. 13-16) with the said changes (R. 249-253). Sabath then submitted such contract, with those modifications, to the City (R. 106).

Prior to the return of the new Agreement to Sabath, the last sentence of paragraph Tenth and all of Paragraph Eleventh had been added. He promptly conferred with Mayor Peterson and Mr. Cowlin, attorney for the City. Sabath told them that he could not recommend that the Yeast Corporation execute the contract, because it could not afford to invest a "couple hundred thousand dollars" in the City of Crystal Lake and have only five years in which to take advantage of the storm sewer for emptying the residue from its operations. The Mayor stated that if the Yeast Corporation complied with the other condi-

tions of the contract and kept taking care of the odor, it could "live" in Crystal Lake as long as it wanted and the contract would be renewed again and again. Both the Mayor and Mr. Cowlin assured Sabath that, if the conditions stated in the first ten paragraphs were performed, such performance would constitute compliance and would be considered as satisfactory so far as the Mayor and the City were concerned. Sabath wrote to Mr. Goldman, Treasurer of the Yeast Corporation, about these conversations and about the assurances of Mayor Peterson and Cowlin. Sabath advised Goldman to execute the contract (R. 115-118). That contract, bearing the date of November 10, 1939, then was executed by the Yeast Corporation and is the contract upon which this suit is based (R. 249-253).

In its Brief, the Petitioner, by implication, magnifies the odors from the Yeast Company's effluent. It would have this Court believe that obnoxious odors from that source were present at all times. The Yeast Corporation produced many witnesses who, though admitting the existence of odor prior to construction of the new \$48,000 odor-removing digesters, stated that it was not continuous (R. 99, 102, 109, 110, 111, 112, 113, 120, 142, 144, 151). Many of the witnesses for the City conceded the same fact (R. 157, 173, 176, 183, 186, 188, 189, 191, 197, 202, 207). None of them noticed any such odors since August 1946. The new digesters installed by the Yeast Corporation now completely eradicate the odors (R. 95, 103, 123, 124, 135, 151, 226).

The City's Brief also minimizes the steps taken by the Yeast Corporation to eliminate the odors and contends that its efforts were only intermittent instead of continuous. In November, 1938, for this purpose, the Yeast Corporation employed Dr. H. O. Halvorson, professor of Bacteriology in the Medical School of the University of Minnesota, who was a recognized authority on industrial waste (R. 91, 118). He has continued as its consultant on

industrial waste from that time to the present, making a number of trips to Crystal Lake each year (R. 120).

At the time when the November 10, 1939, Contract was made, the City knew that science had not yet perfected a means for entirely eliminating the odor from the Yeast Corporation's effluent. The City's attorney was present at a conference with the Sanitary Water Board of Illinois in October, 1939, when this fact was discussed (R. 91). A similar statement was made to the City on May 8, 1938, by Louis A. Smith, attorney for the Yeast Corporation (R. 108).

The Record is replete with the various detailed accounts of the experiments performed and recommendations made by Dr. Halvorson. The Yeast Corporation followed all of his recommendations, although it sometimes was delayed by inability to get materials (R. 120-121).

At first the waste was stored and treated in open lagoons on the seven-acre tract outside of Crystal Lake, formerly used by the Bowman Dairy Company (R. 75-76, 77, 85, 86, 91). The process there was known as anaerobic digestion, that is, treatment in the absence of air. The effluent also was subject to aerobic digestion, that is, in the presence of air, by being pumped through a trickling filter which sprayed it over a bed of rocks (R. 121). It was conceded in the Yeast Corporation's Complaint that "all of said efforts did not at all times remove the unpleasant odor from the waste coming from the manufacture of yeast" (R. 9).

In the course of his research, Dr. Halvorson discovered a so-called "closed system," a new and modern method of removing odor, consisting of two closed tanks, technically called anaerobic digesters. For some time, he was unwilling to recommend spending large sums of money for the new system because of lack of confidence that the new, untried process would work commercially (R. 121-122). The

proposed new digesters and the apparatus used in connection with them required a large quantity of steel and materials critical to the war effort (R. 79). The cost of the project also was in excess of that then permitted without special governmental authorization (R. 98).

The Complaint in this proceeding, seeking an injunction permitting the Yeast Corporation to continue to use the storm sewer, was filed in the Office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on November 3, 1944 (R. 2-13). Shortly thereafter, the Yeast Corporation's motion for a temporary injunction was denied by the District Court (R. 30-31). Upon appeal to the United States Court of Appeals, that decision was reversed and the cause was remanded to the District Court with directions to proceed in accordance with the views there expressed (Pet. 29-36).

While the case was pending on this first appeal, the Yeast Corporation made contracts for the construction of its new treatment plant (R. 87, 88), which was erected at a cost of \$48,000.00 (R. 99) and placed in operation during the pendency of the suit. At the time of the completion of the new odor-removing digesters, there were no competent sanitary engineers available to supervise the operation of the plant, because most of them were in the military service or so employed that they could not undertake additional tasks (R. 80, 95, 123). M. W. Tatlock, a sanitary engineer, was employed by the Yeast Corporation on February 3, 1946, a few weeks after his discharge from military service, to supervise operation of the new treatment plant (R. 80, 95, 125). Mr. Louis Berman, a chemical engineer, was employed on February 20, 1946 (R. 147-148), following his release from the Army, and placed in charge of the actual operation of the new treatment plant (R. 123, 148). As rapidly as possible, all of the effluent was removed from the open lagoons, which have not been used since that time (R. 98). From early August,

1946, there has been no odor from waste produced by the Yeast Corporation's manufacture of yeast in Crystal Lake (R. 217-218, 221, 232-233, 236).

As stated in some detail in the Argument herein, plans for the new digesters had been prepared by the Yeast Corporation and submitted to the City as early as the fall of 1943 (R. 78, 94). If it had not been for the active opposition and passive resistance on the part of the City, the new odor-removing digesters could have, and would have, been completed and placed in full and satisfactory operation before November 10, 1944, when the contract with the City expired (R. 88, 89, 98-99, 132).

The case was referred to a Master in Chancery before whom hearings were held over a long period of time. These hearings ultimately resulted in a Report which was filed by him in the Clerk's office of the District Court on March 25, 1947, and contained a History of the Case, Findings of Fact, Conclusions of Law and a recommendation that a Decree be entered, granting a Writ of Injunction, enjoining the City from interfering in any manner whatsoever with discharge of the Yeast Corporation's cooling water and waste into the storm sewer of the City prior to November 10, 1949,¹ except in the manner and under the circumstances expressly provided in the contract (R. 239-253). Such Findings of Fact have substantial support in the evidence, as held by the courts below. Numerous objections to the Master's Report were filed by the City (R. 253-259) and ultimately overruled by the District Court. Thereupon, a Decree was entered on March 25, 1947, adopting the Findings of Fact and Conclusions of Law of the Master in Chancery and granting an injunction in accordance with the recommendations of the Master in Chancery.

1. In accordance with the renewal clause of the contract (paragraph eleventh, R. 252), this date amounts to a renewal of the contract for five years from its expiration.

The Decree also taxed various costs and made special provisions for credits on account thereof by virtue of payments during the course of the litigation (R. 260-263).

Upon Appeal by the City to the Court of Appeals for the Seventh Circuit, the Decree of the District Court was affirmed by an opinion filed and a judgment entered on November 8, 1948 (R. 296-303). Thereafter, the City filed a Petition for Rehearing which was denied by an Order entered on December 7, 1948 (R. 305). Even though not specifically discussed in the opinions of the Court of Appeals, all of the questions mentioned in the first paragraph of page 9 of the Petition were presented to the Court of Appeals on each appeal.

REASONS FOR DENYING THE WRIT.

1. There is no conflict with the decisions of this Court or of another Court of Appeals.
2. The decision does not involve an important or unsettled question of federal law.
3. The questions which the City seeks to raise consist largely of questions of fact which have been resolved against it by the Master in Chancery and concurring findings of the two lower Courts.

ARGUMENT.

1. The facts in this case are clear. With the exception of one paragraph, every provision of the contract here in question (R. 249-253) sets forth rights or obligations between *only* the Yeast Corporation and the City. The sole portion of that contract which relates, in any way, to the Crystal Lake Building Corporation, which petitioner contends is an indispensable party, is the following:

“Seventh: The National Grain Yeast Corporation and the Crystal Lake Building Corporation, owner of said property, agree to and do hereby indemnify the City of Crystal Lake against any damages it may sustain by reason of any claims filed against the City of Crystal Lake by reason of the National Grain Yeast Corporation discharging its effluent into the storm sewer of the City of Crystal Lake, and the said National Grain Yeast Corporation and the Crystal Lake Building Corporation herewith agree for the life of this agreement not further to encumber its plant at the above-mentioned site.” (R. 252.)

The provisions of Paragraph Seventh above do not give the Building Corporation any rights whatsoever,—no right to use the storm sewer, nor any right to renewal of the contract,—but impose two obligations on it.

The first of those obligations is the purely contingent liability to indemnify the City if it should sustain damages by reason of claims filed against it because of discharge of effluent by the Yeast Corporation into the storm sewer. So far as the Yeast Corporation knows, no claim ever has been filed against the City on that ground (R. 104). The record in this case is entirely devoid of any evidence (or even an allegation) that any such claim ever was filed against the City. No question is involved in this case so

far as the first clause of said Paragraph Seventh is concerned. There is no "collision of interests" (*Dawson v. Columbia Trust Co.*, 197 U. S. 178, 181) between the City and the Building Corporation under that clause, although a collision of interests is required to defeat diversity jurisdiction here.

The other obligation imposed on the Building Corporation by said Paragraph Seventh is the agreement "not to further encumber its plant". Not only was said property not further encumbered after execution of that contract, but the encumbrance then existing was paid by the Yeast Corporation (R. 104).

The Building Corporation was a wholly owned subsidiary of the Yeast Corporation (R. 83) and had been incorporated at the time of the purchase of the property from the Bowman Dairy Company for the sole and exclusive purpose of taking title to the real estate. That was done for two reasons: (1) the Yeast Corporation then was not authorized to do business in Illinois and (2) because, in the opinion of the Yeast Corporation's attorney, it should have nothing to do with the property until it had been determined that "everything would run along smoothly." When that was determined, title was to be conveyed to the Yeast Corporation (R. 109). In furtherance of that program, the Building Corporation had divested itself of title to all of its property by conveyance to the Yeast Corporation prior to the inception of this case (R. 75, 105).

At the time when this suit was filed, the Yeast Corporation was the owner of (a) its factory within the City of Crystal Lake, (b) the right to use the seven-acre country tract formerly used by The Bowman Dairy Company and (c) other real estate used in connection with its treatment plant (R. 75, 105). It has never encumbered its plant in the City of Crystal Lake, but has paid in full the pre-

vously existing mortgage thereon. The manufacturing plant and also the treatment plant now are free and clear of all liens and encumbrances (R. 104).

Numerous decisions support jurisdiction of the District Court where, as here, the facts show that the Building Corporation was neither a necessary nor an indispensable party. Even the cases cited by the Petitioner, when analyzed in light of their facts, are in accord with jurisdiction of the District Court here. *Shields v. Barrow*, 17 How. 130, 139; *Indianapolis v. Chase National Bank*, 314 U. S. 63, 69; *State of Washington v. United States et al.*, 87 Fed. (2d) 421, 427 (C. C. A. 9, 1936).

Furthermore, even though the Building Corporation had been joined as party plaintiff, it would not have ousted the jurisdiction of the District Court under the facts in this case. As clearly shown above, it is not an indispensable party, but is one whose interest, if any, is entirely severable from the issue before the court, so that diversity jurisdiction would not be ousted. *Wormley v. Wormley*, 8 Wheat. 421, 451; *Wood v. Davis*, 18 How. 467, 469; *Walden v. Skinner*, 101 U. S. 577, 589; *Cameron v. McRoberts*, 3 Wheat. 591, 593-594; *Carneal v. Banks*, 10 Wheat. 181, 188-189; *Vattier v. Hinde*, 7 Pet. 252 at 262-263; *Boon's Heirs v. Chiles*, 8 Pet. 532, 535-536; *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U. S. 182, 189-190. As the court below concluded (Pet. 39), at the time of this suit, the Building Corporation was a "figurehead." The Court stated (Pet. 42):

"A 'collision of interests' between the City and the Building Corporation can only arise if and when the City is required to defend a suit for damages growing out of the subject-matter of the contract, but there is no collision of interests in the relief sought in this proceeding."

The remainder of the City's argument on the question

of jurisdiction is specious. It is based upon a feigned concern over loss of the Crystal Lake Building Corporation as an indemnitor under the terms of Paragraph Seventh of the Contract of November 10, 1939. The value of the Crystal Lake Building Corporation as an indemnitor never was any greater than that of its assets which, at the time of the execution of that contract, included the yeast manufacturing plant in Crystal Lake, subject to a purchase-money mortgage. The City now is better indemnified by the renewed obligation of the Yeast Corporation, co-indemnitor under Paragraph Seventh of the contract, because all assets of the Crystal Lake Building Corporation, except a small amount of cash, are owned by the Yeast Corporation and are clear of all encumbrances and liens (R. 75, 104-105).

2. In the exercise of their discretion, municipal corporations are bound, no less than private citizens and other corporations, to standards of reasonableness interpreted in light of all surrounding circumstances. This is particularly true when, by passive resistance and active opposition, the City hindered and prevented the Yeast Corporation from constructing its new \$48,000 waste treatment plant (R. 99) prior to November 10, 1944, when the contract with the City expired.

It is to be noted that Paragraph Eleventh of the contract upon which this suit is based provides for five-year extensions, "providing conditions are satisfactory² to both parties hereto, *at the expiration of this Agreement*" (R. 252) [Italics supplied]. The City adopted numerous Resolutions refusing to renew or extend the

2. In its 1945 opinion in this case, the Court of Appeals for the Seventh Circuit applied Illinois law in holding (Pet. 34) that "satisfactory" means satisfactory to the mind of a reasonable man. The Court relied upon *Erickson v. Ward*, 266 Ill. 259 (1914); *Keeler v. Clifford*, 165 Ill. 544 (1897); and III Williston on Contracts (1936 Revised Edition) Sec. 675a.

contract in question beyond November 10, 1944. Many of them were after the City was given plans, as early as December 7, 1943, showing details of the contemplated new odor-removing treatment plant, and after the City was advised as to the efficiency thereof (R. 181-182). These Resolutions apparently were in accordance with the unexplained plan or wishes of the City as expressed in the statement of its Mayor to the Yeast Corporation that whether the Yeast Corporation eliminated the odor or not, he would get it out of the storm sewer, if it was the last thing he did (R. 140). The various Resolutions of the City, denying or threatening denial of use of the storm sewer by the Yeast Corporation, made its problems in connection with the new treatment plant very difficult and greatly impeded it in obtaining the necessary governmental permits and authorizations and delayed the ultimate construction and completion of the new \$48,000 digesters. If it had not been for opposition by the City, the Yeast Corporation could have, and would have, constructed the present odor-removing digesters and had them in operation before November 10, 1944, when the contract expired (R. 89, 98-99). As the Master and District Court found (R. 244, 261), the Yeast Corporation acted diligently and in good faith in seeking to eliminate odors from the effluent from its manufacture of yeast (R. 76-79, 86, 87, 89, 91-94, 98, 103, 119, 120-123, 131-132, 135).

The matter of opposition and lack of cooperation on the part of the City is largely a question of fact, which already has been determined adversely to the City by the findings of the Master in Chancery, which were adopted by the District Court (R. 261) and quoted with approval by the Court of Appeals (Pet. 42-44). *Inter alia*, the Master in Chancery found (Pet. 43):

“That the failure and refusal of the Defendant to cooperate with the Plaintiff in its efforts to obtain

priority permits, hindered and prevented the Plaintiff from obtaining materials and authorization necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast."

Under such facts, the City cannot be permitted to determine by itself that conditions were unsatisfactory "at the expiration of this Agreement" (Paragraph Eleventh, R. 252), when the continuance of those conditions to that date was largely the fault of the City. As the Court of Appeals stated, "This refusal [by the City] to cooperate was arbitrary and bordered on bad faith" (Pet. 35).

The operation of the new treatment plant since its completion has demonstrated conclusively that the new process has eliminated all unpleasant odor from the effluent arising from the manufacture of yeast in Crystal Lake, which would have been the condition on November 10, 1944, had it not been for the opposition of the City³ (R. 243).

3. At each stage of this litigation, the City has attempted, unsuccessfully, to insist that the contract here in question was the exercise of a legislative function of a municipal corporation and, therefore, not binding upon the City beyond the terms of the Mayor and City Council, which authorized its execution. Apparently, this erroneous argument is based upon the fact that the Statutes of the State of Illinois give the corporate officers of municipalities certain powers in regard to the construction, maintenance and use of storm sewers. The mere fact that a power is granted by the enactment of a legislature does not change the nature of the power and make its exercise automatically a legislative function. Granting a private

3. The Record fully illustrates the positive action and passive resistance by the City, which hindered and prevented the Yeast Corporation from obtaining materials and authorizations necessary for erecting and equipping a plant to eliminate odors from the effluent from its manufacture of yeast. See R. 78, 79, 88-89, 94-95, 98-99, 140, 181, 182; see also Pet. 35, 38, 43.

corporation a non-exclusive right (as in this case) to use a storm sewer is the exercise by a municipality of the same business or proprietary function as exercised in agreements authorizing use of the public streets for the construction and maintenance of water mains and telephone or electric lines. All of these are within the powers of municipal corporations within the State of Illinois, without regard to the relation between the period covered by the contract and the terms of office of the officials who authorized its execution. *City of Rock Island v. Central Union Telephone Co.*, 132 Ill. App. 248, 263-264 (1907); *Wagner v. City of Rock Island*, 146 Ill. 139, 154 (1893); *City of Chicago v. Ames*, 365 Ill. 531, 533 (1937).⁴

4. Disregarding the terms of the contract which sets out the mutual covenants of the parties as the consideration therefor (R. 249-253), the Petitioner appears to contend that the only consideration which can support the contract between the parties hereto is the payment of money by the Yeast Corporation to the City. To understand the actual considerations, a further statement of facts is necessary.

In the contract between the respondent and the Bowman Dairy Company, the former agreed to buy the property in Crystal Lake, ultimately conveyed to it by Bowman, subject to the following conditions (see R. 83, 88, 74, 284):

"It is expressly understood and agreed that the property to be conveyed is to be used for the purpose of the manufacture of bakers' yeast and it is agreed, on behalf of Bowman Dairy Company, that if it be found that there be any ordinance of the township of Crystal Lake, or any other objection upon the part of the city authorities, then the earnest money

4. In view of these decisions, the decision in *Trustees of the Illinois Central Hospital for the Insane v. City of Jacksonville*, 61 Ill. App. 199, 202 (1895), cited by the petitioner (Pet. 25), is not a correct statement of the law in Illinois.

herewith deposited shall be returned to the depositor and the agreement for purchase shall be null and void."

Thereafter, the Yeast Corporation conferred with the City on several occasions before consummating the purchase of the property (R. 74, 90, 107). The fact that the manufacture of yeast produces unpleasant and obnoxious odors was brought to the attention of the City (R. 75, 107).⁵ The need of the Yeast Corporation for adequate sewerage facilities for the disposal of its waste and cooling waters was discussed in detail. The Yeast Corporation was told by the City that the Bowman Dairy Company had discharged its waste on the seven-acre tract a mile from the factory site (outside the city limits of Crystal Lake, and subsequently used by the respondent) and was assured that, if it ever had any difficulty in disposing of its effluent and water in that manner, they could be discharged into the new treatment plant then about to be built by the City (R. 75, 90, 228-229). The Yeast Corporation relied on those statements and consummated the purchase of the property (R. 75).

In these conferences, the City advised the Yeast Corporation that a large number of the citizens of Crystal Lake were then on the relief rolls and that the City was anxious to get them removed therefrom. Frequent inquiries were made by the City as to how many local

5. In light of the knowledge of the City prior to execution of the contract of November 10, 1939, the Master in Chancery was correct in his statement, adopted by the District Court (R. 261), that "Apparently the contract does not bind the plaintiff to an absolute elimination of said odors, but does put the burden upon the plaintiff to use its best efforts to eliminate them, entirely if possible." (R. 242.) The City knew, before executing the contract, that the manufacture of yeast results in an unpleasantly odorous effluent (R. 75, 107), and that there then was no known process for the treatment of waste from the manufacture of yeast (R. 108).

persons would be employed by the Yeast Corporation and the amount of its average weekly payroll (R. 75, 90-91, 107-108). The interest and desire of the City to have the Yeast Corporation establish a plant in Crystal Lake was epitomized by one of its Aldermen when he said that the "stink" (from the Yeast Corporation's effluent) could not be bad enough to stop employment of at least thirty people, because that would take at least thirty families off relief (R. 107-108). The City then wanted and urgently needed for its citizens, the employment and wages that would be available for them if the Yeast Corporation established a manufacturing plant there.

The City was told by the Yeast Corporation that about 100 people would be employed while the plant was being equipped and about 35 or 40 permanently, for whom the average weekly payroll would be \$1200 to \$1600. In addition, \$50,000 to \$60,000 would be spent annually for power, coal and incidental expenses (R. 75, 90-91, 107). These estimates have proven to be correct through the years (R. 76, 106).

Even though it desired to establish a manufacturing plant in Crystal Lake, the Yeast Corporation was under no duty to do so, and would not have done so if certain conditions, heretofore discussed, had not been fulfilled (R. 74-75, 83). In consummating the purchase of both the factory site there and the right to use the seven-acre tract in the country for waste, and in spending \$200,000 for the acquisition and installation of specialized equipment, the respondent relied on the assurances of the City that it could use the sanitary sewers when the City's new treatment plant was completed (R. 75-76). The use of the storm sewer, as provided in the contract, instead of the sanitary sewers as originally contemplated, was a solution suggested by the Sanitary Water Board of Illinois and the Yeast Corporation, as a means of relieving the

City from the problems that would have been created at its municipal sewage treatment plant by the fulfillment of the representations made by the City to the Yeast Corporation (R. 84, 91-92, 93, 100). Rather than being lack of inducement, the Yeast Corporation's relinquishment of the anticipated (and more desirable) use of the sanitary sewer is additional consideration for the contract here in question.

The foregoing constitute good and valuable considerations for execution of the contract by the City. See I Williston on Contracts (1936 Revised Edition) pp. 319, 320-321, 323, 326-327, 384. In addition, by various covenants in the contract (R. 249-253), the Yeast Corporation bound itself to perform numerous obligations,⁶ so that the Master was amply justified in finding that the contract "was based upon good and valuable consideration" (R. 244).

It should be noted that the District Court's injunction does not compel the City to allow the Yeast Company to continue, for an additional period of five years, "the discharge of its obnoxious and stinking waste into the City's storm sewer" as suggested by the petitioner (Pet. 10). Nothing in the decree of the District Court or in the opinion of the court below sanctions the discharge of "obnoxious and stinking waste" into the City's storm sewer. On the contrary, the Master in Chancery found (R. 245):

"That the Plaintiff has eliminated all unpleasant odor from the effluent arising from its manufacture of yeast.

* * * * *

6. There is substantial support in the evidence for the finding of the Master in Chancery (R. 245), adopted by the District Court (R. 261) and quoted by the Court of Appeals (Pet. 43), that the Yeast Corporation has carried out each term, provision, and condition of the contract here in question. (See R. 103-104, 88, 89, 98-99, 132.)

"That the manufacture of yeast by the Plaintiff and the disposal of the effluent therefrom is not now creating a public nuisance in the City of Crystal Lake."

These findings were adopted by the District Court (R. 261) and quoted with approval by the Court of Appeals (Pet. 43, 44) and completely disprove the petitioner's statement that this injunction compels the City to allow the Yeast Company to continue for an additional period of five years to discharge its "obnoxious and stinking waste" into the City's storm sewer.

Conclusion.

The decision of the Court of Appeals is clearly right and does not involve any question of great importance. There is no conflict of decisions. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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